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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 505

CHARLES KOVACS,

Appellant,

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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Counsel for Appellant.

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NEW JERSEY COURT OF ERRORS AND APPEALS

CHARLES KOVACS,

Appellant;

vs.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON,

Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 (1) of the Supreme Court of the United States, as amended April 6, 1942, appellant filed his statement disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 344 (a), which provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, • • • where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, • • • of the United

States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a Writ of Error."

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of the United States Supreme Court.

Legislation Drawn in Question

This case is one in which the validity of State legislation is drawn in question, to wit, Ordinance No. 430 of the City of Trenton, New Jersey, passed August 8, 1946, and the Fourth Section of said Ordinance, reading as follows:

"AN ORDINANCE TO PROHIBIT THE MAKING OF UNNECESSARY NOISE

"THE BOARD OF COMMISSIONERS OF THE CITY OF TRENTON, NEW JERSEY, DO ORDAIN:

"1. That it is hereby declared to be a nuisance and it shall be unlawful for any person, firm or corporation to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in the City of Trenton, any unnecessary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of said city, or any number thereof.

"2. That it shall be unlawful for any person, firm or corporation to play, use, operate or permit to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the production or reproduction of sound with louder volume than is necessary for convenient hearing of the person so playing, using or operating such instrument or device and such persons who are voluntarily listeners thereto, or in such manner as to disturb the peace, quiet and comfort of neighboring inhabitants. Nothing herein contained shall be construed to prohibit playing by a band or orchestra in a hall, building or in the open air.

"3. That it shall be unlawful for any person, firm or corporation for advertising purposes or for the purpose of attracting the attention of the passing public, to play, use, operate, or permit to be played, used or operated any radio receiving set, musical instrument, phonograph, loud speaker, sound amplifier, or other machine or device for the producing or reproducing of sound on the streets or public places of the City of Trenton or in any place where the sound therefrom is cast directly upon the streets or public places, or which is so placed and operated that the sound therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public place, or of persons in neighboring premises.

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

"5. That it shall be unlawful for any person, firm or corporation to sound any horn or warning device on any automobile, motorcycle, bus or other vehicle, except when required by law, or when necessary to give timely warning of the approach of the vehicle or as a warning of impending danger to persons driving other vehicles or to persons upon the street. No person shall sound any horn or warning device on any automobile, motorcycle, bus or other vehicle which shall emit an unreasonably loud or harsh sound, or for any unnecessary or unreasonable period of time.

"6. That any person, firm or corporation who shall violate any of the provisions of this ordinance shall upon conviction thereof be punished by a fine of not to exceed two hundred ($200.00) dollars, or by imprisonment in the county jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated shall be deemed and taken to be a separate and distinct offense.

"7. That all ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed, but only to the extent of such conflict or inconsistency, and this ordinance shall be in full force and effect immediately upon its adoption and its publication, as provided by law.

"8. Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby.

"I hereby certify that this is a true copy.

"Dated Trenton, N. J., September 6, 1946.

T. J. Burns,
City Clerk."

Timeliness

The decision of the New Jersey Court of Errors and Appeals, affirming the judgments of the New Jersey Supreme Court and of the First District Police Court of Trenton assessing a fine of $50.00 was rendered on the 24th day of

April, 1947. On the 9th day of December, 1947, the judgment of affirmance on said decision, which is here sought to be reviewed, was entered, whereupon the judgment of conviction became final.

The application for the allowance of the appeal was presented to the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on the 20th day of June, 1947, and was duly allowed on the 11th day of December, 1947, after the judgment of affirmance, which is the final judgment of the New Jersey Court of Errors and Appeals was entered. The application and allowance were, therefore, timely and this appeal is duly presented and filed within three months from the date such judgment of the New Jersey Court of Errors and Appeals became final.

Opinion

The judgment of the New Jersey Supreme Court was affirmed by the New Jersey Court of Errors and Appeals by an equally divided court which rendered any opinion by the court impossible. The statement of the New Jersey Court of Errors and Appeals to that effect is reported in 135 N. J. L. 534, 52 Atl. 2d 806, and is an appendix to this jurisdictional statement. Reported in the same place and added as appendixes also are the opinion written by Mr. Justice Howard Eastwood of the New Jersey Court of Errors and Appeals in which Mr. Justice Harry Heher and Judges Wells and Freund concurred, and the opinion of Mr. Justice Colie. These opinions favored the reversal of the judgment of the New Jersey Supreme Court. The opinion of the New Jersey Supreme Court is reported in 135 N. J. L. 64, 50 Atl. 2d 451, is set out in the record. (S. C. pp. 15-21) and is an appendix to this jurisdictional statement.

Statement of the Case

(References hereinbefore and hereinafter made to the record refer to the printed record, the State of the Case, as filed with the Court of Errors and Appeals of New Jersey.)

This proceeding against Charles Kovacs was instituted in the First District Police Court of Trenton, New Jersey, by a complaint signed and filed by Patrolman V. Domanski, Police Officer of the City of Trenton (S. C. p. 3).

In the complaint it was charged that appellant, Charles Kovacs, on August 22, 1946, violated the Fourth Section of an Ordinance of the City of Trenton, No. 430, entitled "An Ordinance to Prevent the Making of Unnecessary Noise" in that he "did, on South Stockton Street, in said City, play, use and operate a device known as a sound truck" (S. C. p. 3).

Appellant was arrested on August 23, 1946, under such complaint. The case came on for hearing in the First District Police Court of Trenton on the same day. At the opening of the case appellant, through his counsel, demurred and moved to dismiss the complaint on the ground that the Ordinance upon which the complaint was based was unconstitutional, giving his grounds and reasons therefor, which motion was denied (S. C. pp. 4-5). Appellant testified in his defense (S. C. pp. 5-6). He was adjudged guilty, convicted and sentenced to pay a fine of $50.00 (S. C. p. 6).

On application of the appellant, the Supreme Court of New Jersey issued a Writ of Certiorari directed to Albert Cooper, Jr., Judge of the First District Police Court of Trenton to review the legality of the said judgment of conviction (S. C. p. 1). In the time and manner required by law, the said Judge filed with the Supreme Court of New Jersey his return to the Writ of Certiorari (S. C. pp. 2-9). In the Supreme Court of New Jersey, appellant contended

that the aforesaid Ordinance violated certain provisions of the State Constitution and the 14th Amendment to the Constitution of the United States (S. C. pp. 10-13). The Federal Constitutional questions presented to the New Jersey Supreme Court are the same as are presented to this Court on appeal.

In due course the case came on for hearing before the New Jersey Supreme Court. An opinion was written in which the reasons were stated for affirming the judgment of the First District Police Court of Trenton (S. C. pp. 15-21, 135 N. J. L. 64, 50 Atl. 2d 451). The Court pointed out in its opinion that the record before it showed that "the sole question presented to this court by the prosecutor is the constitutionality of the ordinance. Two grounds on which it is attacked are, first, that it deprives the prosecutor of his rights to freedom of speech and freedom to communicate information and opinions to others and freedom of assembly in violation of Article 1, Paragraph 5, and Article 1, Paragraph 18, of the New Jersey Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution; second, that the provisions of the ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of Article 1, Section 1, of the Constitution of New Jersey and Section 1 of the Fourteenth Amendment of the Constitution of the United States," but held that the Ordinance was constitutional. A Judgment of Affirmance was duly entered (S. C. p. 22).

Thereafter, appellant, in the time and manner prescribed by law, filed and served his Notice of Appeal and Grounds to the New Jersey Court of Errors and Appeals presenting the same constitutional questions (S. C. p. 23). Upon appeal the judgment was affirmed because of an equally divided Court (6-6) which rendered any opinion by the Court impossible. Two opinions were written supporting appel-

lant's contentions and a reversal of the judgment of the New Jersey Supreme Court, one by Mr. Justice Howard Eastwood and the other by Mr. Justice Frederic R. Colie.

How Federal Issues Were Raised

At the trial in the First District Police Court of Trenton appellant demurred and filed a Motion to Dismiss the Complaint raising, among other things, the constitutional questions herein listed (S. C. p. 5). The same constitutional questions were raised before the Supreme Court of New Jersey (S. C. pp. 10-13) and before the New Jersey Court of Errors and Appeals (Brief of appellant in New Jersey Court of Errors and Appeals pp. 4, 5). These grounds were considered and discussed by the trial court (S. C. p. 5), by the Supreme Court of New Jersey (S. C. pp. 15-21) and later by the New Jersey Court of Errors and Appeals, but in all instances were decided adversely to appellant.

Thus there is presented a suit wherein is drawn in question the validity of a municipal ordinance of the City of Trenton adopted pursuant to authority of the State of New Jersey and constituting state action on the ground of its being repugnant to the Constitution of the United States in which the decision of the Highest Court of that State was in favor of the validity of the ordinance.

Wherefore it is submitted that the United States Supreme Court has jurisdiction to review the judgment appealed from.

Facts

Appellant is a life long resident of the City of Trenton. At the time of his apprehension and arrest on August 23, 1946, he was engaged in operating and using a sound apparatus attached to a motor vehicle on South Stockton Street, in Trenton, New Jersey, for the purpose of expressing him-

self on the subject of a labor dispute which was in progress on said South Stockton Street in said city (S. C. pp. 4-6).

Grounds and Decisions Sustaining Appellate Jurisdiction of the Supreme Court of the United States and Showing Federal Questions Involved on Appeal.

ONE

Municipal Ordinances adopted pursuant to State authority constitute State action and are within the prohibition of the 14th Amendment to the Constitution of the United States.

Raymond v. *Chicago Union Traction Co.*, 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757;

Home Telephone & Telegraph Company v. *Los Angeles*, 227 U. S. 278, 33 S. Ct. 312, 57 L. Ed. 510;

Cuyahoga River Power Company v. *Akron*, 240 U. S. 462, 36 S. Ct. 402, 60 L. Ed. 743;

Lovell v. *Griffin*, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666.

The appellee claims for the City of Trenton the legal power and State authority to adopt the aforesaid Ordinance under specific and general statutory enactments being Revised Statutes of New Jersey 1937, 40:48-1 and 40:48-2, which provide:

40:48-1:

"Ordinances; general purpose.

"The governing body of every municipality may make, amend, repeal and enforce ordinances to:

"Auctions and noises. 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent *disturbing noises*."

40:48-2:

> "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

This being so, the Ordinance in question is within the prohibition of the 14th Amendment to the Constitution of the United States.

Two

Appeal is the remedy for review of a decision of the State Court of last resort in favor of the validity of a State law and a municipal Ordinance, where the State law or municipal Ordinance is alleged to infringe the Federal Constitution.

Western Turf Association v. *Greenberg*, 204 U. S. 359, 27 S. Ct. 384, 51 L. Ed. 520;

Great Northern Ry. Co. v. *State of Minn.*, 278 U. S. 503;

Nashville & St. Louis Ry. v. *White*, 278 U. S. 456.

Three

The *provisions of the Ordinance* deprive appellant of his rights to freedom of speech, freedom of press, freedom to communicate information and opinions to others and freedom of assembly contrary to Section 1 of the 14th Amendment to the United States Constitution and are, therefore, unconstitutional.

Lovell v. *Griffin*, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666;

Hague v. *C.I.O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423;
Schneider v. *New Jersey*, 308 U. S. 147;
Jamison v. *Texas*, 318 U. S. 413, 63 S. Ct. 669;
Ex Parte Jackson, 96 U. S. 727, 24 L. Ed. 877;
Cantwell v. *Connecticut*, 310 U. S. 296, 84 L. Ed. (Adv.) 836;
Thornhill v. *Alabama*, 310 U. S. 88;
Martin v. *City of Struthers, Ohio*, 319 U. S. 141, 63 S. Ct. R. 862;
Jones v. *Opelika*, 316 U. S. 584, 595, 596.

Discussion

Under the 14th Amendment to the United States Constitution, basic civil liberties including freedom of speech, press and assembly are guaranteed against infringement by the several states.

The power of municipalities to enact regulations in the interest of public safety, health and welfare or convenience may not be so employed as to abridge constitutional rights of freedom of speech, of communicating information and opinion to others, of the press and of assembly. Civil Liberties are not subjected to the "'comfort and convenience" of the citizens.

Public streets, parks, highways, hustings, commons, plazas and other public places have been used as forums for the dissemination of information and opinion, public discussion and the exchange of ideas upon social, political, economic, religious and other important subjects in which the people have an interest as far back as the mind of free people can remember. These forums cannot be denied to the people by censorship laws or prohibitory laws. *Jamison* v. *Texas*, 318 U. S. 413, 63 S. Ct. 669; *Schneider* v. *New Jersey*, 308 U. S. 147; *Hague* v. *C. I. O.*, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

The Ordinance in question, in its broad sweep prohibits speech entirely whether in a public or private place. It seeks to make no distinction as to the times, places, purposes or the contents of the utterances which it forbids. It lays down a blanket ban on all outdoor speaking, anywhere.

Section 4 of the Ordinance, under which appellant was charged, prohibits any person from using for any purpose whatsoever, a loud speaker or sound amplifier which emits therefrom "loud and raucous noises" and is attached to any vehicle operated or standing upon the streets of the City of Trenton.

This case falls squarely within the rule announced by the Supreme Court of the United States in *Hague* v. *C. I. O.*, *supra;* in so far as the Ordinance provides for prohibition of the use of necessary and ancillary equipment in the exercise of freedom of speech the case falls within the rule announced by the court in *Jamison* v. *Texas*, 318 U. S. 413.

The mere fact that the Ordinance is directed to the use of such sound apparatus on the streets or public places of the City of Trenton does not save it from the constitutional prohibition. It rather serves to condemn it. In the case of *Hague* v. *C. I. O.*, *supra*, the U. S. Supreme Court declared unconstitutional an Ordinance of the City of Jersey City which sought to license, through the Director of Safety, public meetings in streets, parks and public places. The Supreme Court in denouncing the Ordinance held (307 U. S., at p. 515):

> *"Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places have, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.*

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; *but it must not in the guise of regulation be abridged or denied.*"

And at page 516:

"We think the Court below was right in holding the Ordinance quoted in note one void upon its face. It does not make comfort and convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. *But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.*"

In recent years, it has come to be recognized by all that the use of amplifying devices in radio broadcasting and in public speaking in public places such as auditoriums, streets, parks and halls, is a necessary and usual ancillary for effective free speech that is intelligible. Without the use of such devices the right of free speech is definitely and seriously curtailed and impaired, if not frustrated entirely. Accordingly, it can now be said that the use of sound devices is a necessary part of the effective exercise of freedom of speech. *Therefore, the right to interfere with the use of such amplifying devices is limited to the same rules of restraint and regulation as would apply to any restraint upon the exercise of freedom of speech itself. The mere fact that this*

is an amplifying device does not alone provide the city with new and extraordinary reasons for prohibiting and censoring the use of such device.

The use of speech in the exercise of these constitutional rights is not static, is not confined to peroration of ancient times. The inhabitant of this land, in his exercise of speech, is as much entitled to use modern-day inventions to augment his exercise of that right as he is in exercising his right of freedom of the press entitled to use modern-day printing machinery. Amplifying devices are as much a part of effective exercise of modern-day speech over the radio and in public places as is paper or the printing press essential for effective exercise of freedom of press. Purely because sound-amplifying devices are relatively new and a departure from traditional practice is no reason for prohibiting their use for lawful purposes any more than would be justifiable the prohibition of use of the printing press because it was relatively modern.

Assuming that the city has the right to reasonably regulate the use of a sound amplifying device in circumstances like those here involved, as to time, place and manner, this Ordinance is not such. It appears on its face to be prohibitory. It does not attempt, either explicitly or implicitly, to license or in any other way regulate or control the use of sound apparatus on the City streets in the exercise of free speech and the communication of information and views. Section 4 of the Ordinance is so sweeping in its ban that it prevents any public outdoor meeting for any purpose whatsoever. It absolutely and unequivocally prevents the communication of views and the exercise of free speech, for it is practically impossible to exercise those rights on public streets today and be heard without the use of sound amplifiers.

The United States Supreme Court in *Hague* v. *C. I. O.*, *supra*, pointed out that no more grave and important issue

can be brought to the Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship, and that although the 14th Amendment created no rights in citizens of the United States, but merely secured existing rights against State abridgment, *it is clear that the right peaceably to assemble and to discuss topics and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the amendment protects.* The Court further pointed out (307 U. S., at p. 525):

> *"It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."*

The section of the Ordinance in question is not limited to speech which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose. There is no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets. It prohibits entirely the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

These guaranteed rights are not exercised in a vacuum. They naturally and impliedly include the attraction of a crowd. The United States Supreme Court has recognized this with respect to the exercise of freedom of the press. In the case of *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877, the Court held that regulations against the transportation in the mail of printed matter, which is open to examination, cannot be enforced so as to interfere in any manner with the freedom of the press and stated (96 U. S., p. 733, 24 L. Ed., p. 879):

> "Liberty of circulating is as essential to that freedom as liberty of publishing, indeed, without the circulation, the publication would be of little value."

The same principle applies to the case at bar. A speech is delivered to an audience. The freedom to make a speech includes the freedom to be heard. *Section 4 of the Ordinance cannot be saved because it relates to the distribution of speech and not to the enunciation, for liberty of circulating is as essential to that freedom as liberty of speaking. Without the circulation, the enunciation would be of little value. Ex parte Jackson, supra; Lovell v. City of Griffin, supra.*

In the case of *Schneider* v. *State of New Jersey*, 308 U. S. 147, 60 S. Ct. 146, the United States Supreme Court declared unconstitutional an Ordinance of the Town of Irvington which prohibited canvassing, soliciting and the distribution of circulars, or other matter, or calling from house to house in that town, without first having reported to and received a permit from the Chief of Police or other police officer. In making its decision, the Court held the Ordinances not to be regulatory, but censorial and prohibitory and stated (308 U. S. at p. 150):

> *"This Court has characterized the freedom of speech and that of the press as fundamental personal rights*

and liberties. This phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights that lies at the foundation of free government by free men. It stresses as do many opinions of this Court, the importance of preventing the restriction or enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the Courts should be astute to examine the effect of the challenged legislation. *Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.* And so, as cases arise, the delicate and difficult task falls upon the Court to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

"In Lovell *v.* City of Griffin, supra, this Court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the City Manager. The opinion pointed out that the Ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time or place of distribution. The Court said that, whatever the motive, the Ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the Ordinance was void on its face, because it abridged the freedom of the press. • • •

"• • • As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which in-

vades the free communication of information and opinion secured by the Constitution. * * * But, as we have said * * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

"While it affects others, the Irvington (New Jersey) ordinance drawn in question in No. 11, as construed below, affects all those who, like petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities, it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it * * *

"As said in Lovell *vs.* City of Griffin, supra (303 U. S. 444), pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantee.

"*Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval.* * *

> "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

In a subsequent decision, *Cantwell* v. *Connecticut*, 310 U. S. 296; 84 L. Ed. (Adv. 836) a statute which prohibited solicitation without a permit of money or subscriptions for religious causes, was held to violate the freedom of speech guaranty as applied to one who stopped two men on the street, set up a phonograph and played a record attacking a certain religion and church. The court said:

> "First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment * * * *In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.* No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon the streets, and of holding meeting thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured,

solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited. * * * But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. * * * *Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.* Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."

In *Thornhill* v. *Alabama* (310 U. S. 88) the prohibitory statute there knocked down prevented picketing and going upon private premises. The petitioner picketed upon the private premises of the Brown Wood Preserving Company, Inc., contrary to its wishes, and in defiance of its commands to leave the property. In setting aside the conviction as being an abridgment of freedom of speech and press, the court said:

"First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in

those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare United States *vs.* Carolene Products, 304 U. S. 144, 152-153n. *Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations.* Schneider *v.* State, 308 U. S. 147, 161, 162.

"Second * * * proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See Near *v.* Minnesota, 283 U. S. 697, 713. One who might have had a license merely for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. * * *

"* * * The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. * * *"

In the case of *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. Ed 941, 58 S. Ct. 66, the United States Supreme Court declared unconstitutional an Ordinance of the City of Griffin,

Ga., which prohibited the distribution of literature of any kind without a permit from the City manager, stating (303 U. S., at p. 451):

> "We think that the Ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of freedom of the press by subjecting it to license and censorship."

The New Jersey Supreme Court conceded that the freedoms of expression and assembly of appellant may have been prohibited, but justifies such prohibition on the ground that it leaves untouched his right to express his views orally without the aid of an amplifier (S. C., pp. 17, 18). It is well established by a long line of decisions that the restriction of any basic civil right cannot be justified by the fact that other rights remain unimpaired and that the denial of a right in one manner, respect or place may not be warranted by the freedom to exercise that right in other ways, respects or places. See *Schneider* v. *State of New Jersey*, 308 U. S. 147, where the U. S. Supreme Court declared: "*But as we have said* * * * *one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.*"

Appellant has the right to the most effective exercise of his freedoms and such exercise of those rights cannot be burdened or diminished. If the use of a sound amplifier makes the exercise of his rights to freedom of speech and assembly more effective, then neither the legislating body nor the Courts may deny him the use of such equipment. "*Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the*

effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama, supra.*

The New Jersey Supreme Court adopts a "forced audience theory to support its decision and concludes (S. C., p. 20):

> "The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen. The means of expression through a sound amplifier is tantamount to compulsion."

Certainly, there cannot be said to be more of an element of compulsion in the use of a sound amplifier in the exercise of freedom of expression and freedom of assembly, than exists when literature is distributed in the exercise of freedom of the press and speech, whether by handing it to a person, or leaving it on his doorstep, or sending it through the mails. Nor is there any greater compulsion than can be said to exist in canvassing, soliciting or making house-to-house calls for religious or political purposes. *Schneider* v. *State of New Jersey, supra; Lovell* v. *Griffin, supra; Cantwell* v. *Conn., supra; Ex parte Jackson, supra.* Those are just as much acts of compulsion in the same sense as the use of a sound amplifier.

However, the "forced audience" theory in such circumstances has been entirely vitiated by the decision of the United States Supreme Court in the above cases and definitely in the case of *Martin* v. *City of Struthers, Ohio*, 319 U. S. 141; 63 S. Ct. R. 862. There, appellant, espousing a religious cause, canvassed homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. The city ordinance forbade the summoning of inmates in that manner for that purpose. The Supreme Court held the ordinance to be a violation of the constitutional rights

to free speech and press. Mr. Justice Black, speaking for the Court, stated (319 U. S., p. 141):

> "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to occupants or to invite them to political, religious, or other kinds of public meetings. *Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.* In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the Federal Constitution's guarantee of free speech and press, possesses this power."

* * * * * * *

(p. 143):

> "The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature.* Lovell *v.* Griffin, 303 U. S. 444, 452, 58 S. Ct. 666, 82 L. Ed. 949, *and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets.* Schneider *v.* State, 308 U. S. 147, 162, 60 S. Ct. 146, 151, 84 L. Ed. 155. Yet the peace, good order, and comfort of the community may imperatively require the regulation of the time, place and manner of distribution. Cantwell *v.* Conn., 310 U. S. 296, 304, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 128 A. L. R. 1352. * * *
>
> "We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in

the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message against the interest of the community which by this ordinance offers to protect the interests of all its citizens, whether particular citizens want that protection or not. The Ordinance does not control anything but the distribution of literature and in that respect it substitutes the judgment of the community for the judgment of the individual householders. • • •

"Ordinances of the sort now before us may be aimed at the protection of the householder from annoyance, including intrusion upon the hours of rest and at the prevention of crime. • • •"

(p. 145):

"While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. • • •

"Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

"*Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to*

> *the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.* The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."

The City of Trenton does not have the power to determine for all its inhabitants that they do not desire to listen to expressions of opinions enunciated over sound amplifiers. It must preserve for those who desire to exercise their freedoms of expression and assembly in that manner and for those who are willing listeners their rights so to do, just as it must preserve the right of a distributor of literature and of those willing to receive it. The first duty of the City is to *preserve* those constitutional privileges. Whatever inconvenience it causes the City, the City must find ways to regulate without invading constitutional rights.

The United States Supreme Court has gone far to protect the right of free speech together with the other basic civil rights from invasion in any degree even to the extent of leaving them to the caprice of a licensing officer or an electorate. *West Virginia State Board of Education* v. *Barnette*, 63 S. Ct. 1178, 319 U. S. 624, 87 L. Ed. 1628.

The only permissible limitation upon the exercise of those freedoms may be said to be, at most, reasonable regulation as to time, place and manner. Ordinances prohibiting or censoring the exercise of these activities have uniformly been held unconstitutional. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid." *Jones* v. *Opelika*, 316 U. S. 584, 595, 596.

The Ordinance in question cuts off entirely from the hearer the right to hear effectively a public speech in a public place. It deprives the speaker of the right to be heard intelligibly by his entire audience. It therefore abridges the right of freedom of speech and of communication and of assembly. It certainly is not regulatory as to time, place or manner in which one may use a sound amplifying device in the City. It does not purport to be a revenue-raising measure to bear any excessive police burdens resulting from the use of sound equipment.

It must be conceded that the public utterances of appellant amplified in the interest of willing listeners come clearly within the category of free speech and assembly guaranteed by the Federal Constitution.

The Bill of Rights embodied in the Federal Constitution is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual—rights which are part of our democratic traditions and which no government may invade. Where a legislative body has sought to invade a field from which, under the Bill of Rights, the government is excluded, and has violated rights guaranteed by the Constitution, the courts must refuse to recognize or sanction the legislative decree. Legislative bodies are no less responsible than the courts for the preservation of the liberties of the individual, guaranteed by the Bill of Rights.

History teaches us that there have been but few infringements of personal liberty by the State which have not been justified, as they are here, in the name of the public good or under the patriotic demand for law and order. The framers of the Constitution were not unaware that, under the system which they created, most governmental curtailments of personal liberty would have the support of a legis-

lative judgment that the public interest would be better served by its curtailment than by its constitutional protection.

We cannot conceive that in prescribing, as limitations upon the power of government, the freedom of the mind, spirit and expression secured by the explicit guarantees of those freedoms, they intended or rightly could have left any latitude for a legislative judgment that the State's authority to control its public streets is an absolute to which free speech, facilitated and made more effective with the aid of every modern device, must yield. And that such authority, in so prohibiting the use of necessary and modern devices, could be made the instrument of suppression of such freedoms.

FOUR

The provisions of the Ordinance are beyond the police power of the City of Trenton and are prohibitory and not regulatory.

Schneider v. *State of New Jersey*, 308 U. S. 147;
Thornhill v. *Alabama*, 310 U. S. 88;
Cantwell v. *Conn.*, 310 U. S. 296;
Lovell v. *Griffin*, 303 U. S. 444;
Hague v. *C. I. O.*, 307 U. S. 496;
Martin v. *City of Struthers, Ohio*, 319 U. S. 141.

Discussion

Under the police power, an Ordinance must have real and substantial relation to the public safety, health, morals or general welfare. Neither the legislature nor a municipal governing body may, under the guise of promoting the general welfare, interfere with lawful activities and pursuits. Liberty means not only freedom from imprisonment or restraint, but the right to live and work, enjoy basic

freedoms and earn a livelihood in any lawful calling or to pursue any lawful trade or avocation.

The problems involved in determining whether a particular law is within the police power of the State are well summarized in Freund's work on "The Police Power," page 133, section 143, where he states: "The Questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

The New Jersey Supreme Court contends that the use of a sound truck constitutes a potential nuisance and as such is within the police power of the city for the reasons that (S. C., p. 17):

> "The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is almost involuntarily attracted to the source of the noise. Thus new traffic hazards are added to the ever-increasing dangers of city thoroughfares."

The record is barren of any evidence whatsoever which establishes or from which it might be inferred that attention of motorists and pedestrians is so diverted as to create new traffic hazards or that appellant's acts on the day of his arrest had that effect. There are many things on the public highways and streets which may similarly divert the attention of motorists and pedestrians, for example, billboards, window displays, road repairs, airplanes, jet planes, etc. Even a pretty girl has been known to divert the attention of motorists. Yet no governing body or court would seri-

ously contend that pretty girls should be barred from the streets and highways. Nor that such other lawful activities could or should be banned for that reason.

The United States Supreme Court has repeatedly asserted that uncontrolled official suppression of any of the guaranteed privileges cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. *Hague* v. *C. I. O., supra; Lovell* v. *Griffin, supra,* and all other cases cited herein. The point was well made in *Schneider* v. *State of New Jersey, supra,* where the Court states (308 U. S. at p. 150):

> "*Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the constitution to those who wish to speak, write, print or circulate information or opinion.*
>
> "*Municipal authorities as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.* • • •
>
> "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. *Any burden imposed upon the city authorities in clearing and caring for the streets as in indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.* • • • *As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.*"

In *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court stated the same principle in these words: "Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

Moreover, statutes that regulate speech or the press that have been upheld as not in conflict with our fundamental law, are those directed at abuses which menace the state itself, e. g., utterances or acts inimical to public welfare, tending to corrupt public morals, incite to crime, disturb public peace, etc., *and then only where there is a clear and present danger to a substantial interest of the State. Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Conn.*, *supra*; *Thomas* v. *Collins*, 323 U. S. 516. An example of this point is given in the *Thornhill* v. *Alabama*, *supra*, as follows:

> "*The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. * * * The danger of breach of the peace or serious invasion of the rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448.*"

The principle was more recently affirmed in *Thomas* v. *Collins, supra*, where the U. S. Supreme Court said:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

There is no such showing in the instant case of any sufficiently imminent menace to the State itself or to the public welfare from the use of sound apparatus in all cases as to warrant either the legislative body or this Court in determining that the use of such apparatus is not appropriate any place in the City of Trenton and for any purpose. Appellant's conduct was not said to involve a breach of the peace, commission of a nuisance, disturbance or impeding traffic. The utterances of appellant over the loud speaker are not asserted to have been abusive, subversive or in any other respect unlawful.

An Ordinance regulating commercial pursuits and activities is one thing, but the application of regulations to conduct such as of appellant in this case, thereby interfering with his exercise of a constitutional right, is another. There is a difference in degree, which emphasizes the importance of protecting the individual from invasion of his constitutional liberties as distinguished from regulation of purely commercial enterprises. See *Schneider* v. *State of New Jersey, supra*, where the Court made the differentiation as follows: "The Ordinance is not limited to those who canvass for private profit; nor is it merely the common type of Ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general Ordinance to prohibit trespassing. It bans unlicensed views or the advocacy of any cause from door to door * * *."

Furthermore, the Ordinance here is not regulatory, but prohibitory.

It has not been shown that outright prohibition of the use of sound amplifiers is warranted; that there exists any clear and present danger to a substantial interest of the State. Prohibition may be more convenient to the law maker and easier to fashion than a regulatory measure which adequately protects the general welfare of the community without suppressing legitimate liberties. But that does not justify a repressive enactment like the present one. *Basic freedoms have a higher dignity under the Constitution than municipal or personal convenience.*

FIVE

As it has been construed and applied by the courts below to abridge and deny appellant's constitutionally guaranteed rights of freedom of speech, of press, of assembly, and to communicate information and opinions to others, the Ordinance is presumptively unconstitutional, and which presumption the appellee has failed to overcome by a showing that the Ordinance is a reasonable and necessary means to prevent a clear, present and substantial danger to the public peace and order or right of a state to protect the welfare of its inhabitants and is constitutional.

DeJonge v. *Oregon* (1937), 299 U. S. 353;
Busey v. *District of Columbia*, 78 U. S. App. D. C. 189, 138 Fed. 2d 592, Executing Mandate at 319 U. S. 579;
Murdock v. *Pa.*, 319 U. S. 105;
U. S. v. *Carolene Products Co.*, 304 U. S. 144, 152;
West Virginia State Board of Education v. *Barnette*, 319 U. S. 624, 638-640;
Thornhill v. *Alabama*, 310 U. S. 88;
Schneider v. *N. J.*, 308 U. S. 147;
Thomas v. *Collins*, 323 U. S. 516.

Discussion

The Courts below leaned upon the doctrine of the protection of public rights and the presumption of constitutionality as a refuge from the constitutional assault here made by appellant. The New Jersey Supreme Court actually conceded that the Ordinance may deprive appellant of his freedom of expression and assembly but sought to justify it on the basis of the rights of the public to "at least a modicum of peace and quiet to which it is entitled" (S. C., pp. 17-21).

When a regulation enacted under the police power of a municipality, whether on its face, as applied, or constructively, abridges, prohibits, or infringes upon any of the freedoms guaranteed by the First Amendment to the Federal Constitution, such Ordinance or regulation is *presumptively invalid* and the burden falls on the authority asserting the power under the regulation to prove by a preponderance of the evidence that the regulation is a valid exercise of the police power directed at some *abuse* of the constitutional rights which, unless prohibited or regulated, would constitute a *clear and present danger* to the health, safety or general security of the community as a whole. *The showing of the abuse is a condition precedent to the exercise of the police power, where such exercise of power has a tendency to limit, infringe, restrict or prohibit any of the constitutional freedoms.* The police power does not even exist in such cases unless there is a clear showing of the *abuse*. This rule is well stated by Chief Justice Hughes in *DeJonge* v. *Oregon* (1937), 299 U. S. 353:

> "The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. * * * Therein lies the security of the

republic the very foundation of constitutional government."

This same rule was effectively supplied by the United States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia*, decided November 8, 1943 (78 U. S. App. D. C. 189, 138 F. 2d 592, executing mandate at 319 U. S. 579). There an occupational license tax was sought to be applied to the activity of Jehovah's Witnesses. The controversy reached the Supreme Court after the precedent case of *Murdock* v. *Pennsylvania* (319 U. S. 105) had been decided May 3, 1943. The Court remanded the case to the Court of Appeals for further consideration. Upon such reconsideration, Mr. Justice Edgerton, speaking for the Court, held:

> *"Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty'* (Palko *v.* Connecticut, 302 U. S. 319, 325). They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism) * * *.
>
> *"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The*

burden of proof in such a case should be upon those who deny that these freedoms are invaded. * * * No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

The decisions of the United States Supreme Court in *United States* v. *Carolene Products Co.* (1938), 304 U. S. 144, 152; *West Virginia State Board of Education* v. *Barnette* (1943), 319 U. S. 624, 638-640; *Thornhill* v. *Alabama* (1940), 310 U. S. 88; and *Schneider* v. *New Jersey* (1939), 308 U. S. 147, all apply this same rule.

In the enclosure of civil rights and fundamental personal liberties secured by the express guarantees of the Federal and State Constitutions, there is not established a broad channel in which the government and the courts may operate according to their discretion. The people, by these specific constitutional provisions, have definitely narrowed the channel of regulation and governmental activity and walled that in by high banks of rock, as it were, on both sides of the governmental waters. This is to prevent a change of course of the stream and to keep the way straight and narrow. If the government gets out of its fixed course in these precious fields, there immediately arises a presumption of invalidity and unconstitutionality to throw back the stream of regulatory practice into the fixed channel properly made by the people through their Constitution.

In his book "The Struggle for Judicial Supremacy" (New York, Knopf, 1941), Robert H. Jackson, now Associate Justice of the Supreme Court of the United States, says (page 285):

> "The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech, free press and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is

uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the court, by intervening, restores the processes of democratic government; it does not disrupt them."

The appellee thus far has failed to show a real (as distinguished from imagined) clear and present danger and has thus not discharged the heavy burden that is placed on it where these precious civil rights are infringed.

No evidence was produced and no showing made of the need for such an ordinance. Until the appellee, has discharged its burden, by proving a clear and present danger of substantial evils to the community, its attempts to apply and enforce the ordinance cannot be sustained. In holding that a clear-and-present danger test must be applied to police-power abridgments of the liberties protected by the First Amendment, the United States Supreme Court, in the "labor organizer" case, *Thomas v. Collins* (323 U. S. 516), said:

"The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment. (cases) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare United States *v.* Carolene Products Co., 304 U. S. 144, 152-153.

"*For these reasons any attempt to restrict those liberties must be justified by clear public interest,*

threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on a firmer foundation.''

Judged by these standards, it is clear that appellant's conduct, under the circumstances, did not and could not constitute any clear and present danger which would justify an application of the police power that curtails the personal liberties secured by the Federal and State Constitutions.

Six

The provisions of the Ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of the 14th Amendment to the Federal and State Constitutions.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516;
Lanzetta v. *The State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888;
U. S. v. *Brewer*, 139 U. S. 278, 11 S. Ct. 538, 35 L. Ed. 190.

Discussion

The criminal statute, vague and indefinitely expressed so that it fails to establish a standard of conduct comprehensible to men of common intelligence, to the end that they may act to keep themselves without the purview of the statute, deprives defendants in criminal cases of their liberty without due process of law.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, Chief Justice White said (p. 520):

> ''Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no *immutable* stand-

ard of guilt, *but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it*, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained. * * *

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any reason wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statements as to render elaboration on the subject wholly unnecessary."

The United States Supreme Court in the case of *Lanzetta v. The State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888, held Section 4, Chapter 155, Laws of 1934, commonly known as the Gangster Act, unconstitutional on the ground that the act was vague and uncertain, the Court stating, 83 L. Ed., page 890:

"*No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.* The applicable rule is stated in Connally v. General Constr. Co., 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126: '*That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague*

that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In dealing with the question of the vagueness of this Ordinance, let us first for a moment consider the phrase "unnecessary noise." What does the Board of Commissioners mean by "unnecessary noise?" What is "necessary noise" and what is "unnecessary noise?" Webster's New International Dictionary, 2d Edition, says that "unnecessary" is something not needed or required and that "necessary" is essential to a desirable or projected end or condition or resulting from the happening in accordance with necessity; determined by the nature of things; predestined or obedient to natural law.

Who, in the case *sub judice*, is to determine what is "necessary" and what is "unnecessary" noise? By what basis or standard is this to be determined? Additionally, the terms "physically annoying," "harsh," "prolonged," "unnatural," "unusual," "physical discomfort," "loud," "annoyance," "inconvenient," "raucous," "unreasonable," are abstract and indefinite. When do they arise? Is it left to the complainant, the Police Officer or the trier of the law and the facts to determine beyond a reasonable doubt, when noises or sounds are "necessary" or "unnecessary," "physically annoying to persons," "harsh," "prolonged," "unnatural," "or unusual in their time and place" and when they occasion "physical discomfort"?

What may be deemed necessary by one person can at the same time be unnecessary to another. What may be physically annoying, harsh, prolonged, unnatural or unusual to one person may be comfortable, natural and usual to another. What may occasion physical discomfort to one may give another comfort and pleasure. How is a person to know what sounds may be deemed necessary, comfort-

able and pleasing to others and what will occasion hostile feelings in them?

Examining Section 4 of the Ordinance, we find forbidden "loud" and "raucous" noises which emanate from a sound apparatus. What is meant by "loud" and what is meant by "raucous." Webster's New International Dictionary, 2d Edition, defines "loud" as being marked by intensity or relative intensity; not low and soft or subdued. The word "raucous" it defines as disagreeably harsh.

These terms, as previously stated, are abstractions. They depend entirely upon the subjective reactions and responses of individual persons in each given case. Thus phases of human reaction or emotion are made the standard for a penal statute. This is forbidden under our law.

It has been established that a criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it, and, if deviation from a standard is prohibited the standard must be definitely fixed. *U. S.* v. *Armstrong,* 265 Fed. 683.

In *United States* v. *Brewer,* 139 U. S. 278 on page 288, 11 Sup. Ct. 538, on page 541 (35 L. Ed. 190) the Supreme Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States *v.* Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States *v.* Lacher, 134 U. S. 624, 628."

The entire ordinance is replete with words and phrases which lack certainty. In the first section we find such

phrases as "unnecessary noises," "physically annoying to persons" or so "prolonged, unnatural, or unusual in their use, time and place" as to occasion "physical discomfort." Those phrases are uncertain and indefinite so that serious doubts arise from the generality of just such language.

The second section of the enactment also employs the expression "with louder volume than is necessary for convenient hearing." It is ambiguous. The Ordinance fails to indicate what constitutes "convenient hearing."

The third section of the Ordinance employs the terms "annoyance," "inconvenience." These too are ambiguous and indefinite, for it does not indicate what would constitute "annoyance" or "inconvenience."

The fourth section uses the term "loud and raucous noises." This as previously stated is uncertain and indefinite and dependent upon subjective reaction and response of individual persons.

And so the same can be said of the phraseology in the sixth section, an "unreasonable loud or harsh sound" and "unnecessary" or "unreasonable" period of time.

The challenged provisions condemn no act or omission. The terms which the Ordinance employs and which it purports to denounce are so vague, indefinite and uncertain that the entire Ordinance as well as Section 4 of the Ordinance must be condemned as repugnant to the due process clause of the 14th Amendment.

SEVEN

The provisions of the Ordinance are unconstitutional in that they do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh,

prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment in violation of the 14th Amendment to the Federal Constitution guaranteeing due process and equal protection of law.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516;

Discussion

If the legislature, or any law-making body, leaves to administrative officers the determination of what the law should be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. Sutherland on Stat. Const. (2d Ed.), page 148; *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

The Ordinance *sub judice* clothes administrative officers with arbitrary and discriminatory power to determine what is meant by and what constitutes "necessary" and "unnecessary" sounds, "unnecessary or unreasonable periods of time," "physically annoying to persons," "harsh," "prolonged or unnatural or unusual," "annoyance or inconvenience," and specifically in Section 4 of the Ordinance, what is meant by and what constitutes "loud and raucous noises." The Ordinance fails to specify when specific acts are brought within its prohibition under those phrases. Moreover, it fails to prescribe any rules, basis or limitations to act as a guide in forming judgments by the administering officers. The criminality is dependent upon what variant courts may determine to be loud and raucous noises. It must of necessity vary with the different reaction of every individual complainant and of every court. So construed the Ordinance and Section 4 thereof must of necessity fall within the constitutional prohibitions.

Conclusion

WHEREFORE, the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with the rules of the Court, because the Court below disposed of important and substantial Federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the nation's highest Court and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for the exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully Submitted,

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Attorney for Appellant.

APPENDIX "A"

NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

No. 27

CHARLES KOVACS, *Prosecutor-Appellant,*

vs.

ALBERT COOPER, JR., *Judge of the First District Police Court of Trenton, Defendant-Respondent.*

Argued February 6, 1947. Decided April 24, 1947.

On appeal from Supreme Court, whose opinion is reported in 135 N. J. L. 65.

The judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division which renders any opinion by the court impossible.

For the Appellant—George Pellettieri of Trenton.

For the Respondent—Louis Josephson and John A. Brieger, both of Trenton.

Per CURIAM:

The judgment herein is affirmed by an equally divided court.

APPENDIX "B"

NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

CHARLES KOVACS, *Prosecutor-Appellant*,

vs.

ALBERT COOPER, JR., *Judge of the First District Police Court of Trenton, Defendant-Respondent*

Submitted February term, 1947.

On appeal from New Jersey Supreme Court.

For Prosecutor-Appellant—George Pellettieri of Trenton.

For Defendant-Respondent—Louis Josephson and John A. Brieger, both of Trenton.

The judgment of the Supreme Court was affirmed by reason of an evenly divided vote (6—6) of the Court of Errors and Appeals.

The following opinion sets forth the writer's reasons for a reversal of the Supreme Court Judgment.

EASTWOOD, *J.*:

Prosecutor-Appellant was convicted in the Police Court of the City of Trenton for violation of the fourth Section of an ordinance of the City of Trenton, entitled "An Ordinance to Prevent the Making of Unnecessary Noise." On certiorari, the judgment of conviction was affirmed. The factual minutiae reveal that prosecutor-appellant, on August 22, 1946, placed what is commonly known as an amplifier on a sound truck driven by another on South Stockton Street in the City of Trenton, and employed the device both for playing music and speaking through the sound amplifier. Although the record is barren as to the purpose or subject made of prosecutor-appellant's discourse, it is stated in the brief filed on his behalf that his comments were made in relation to a labor dispute then in progress in Trenton. On August 23, 1946, prosecutor-appellant was tried and convicted by defendant-respondent, sitting as Judge of the

Trenton Police Court, who imposed a fine of $50.00 upon prosecutor-appellant under the provisions of Section 4 of the ordinance in question.

The question presented for judicial determination is the constitutionality of the ordinance. It is claimed by prosecutor-appellant that the challenged ordinance deprives him of various unalienable rights, among which are freedom of speech and freedom to communicate information and opinions to others, and freedom of assembly guaranteed to him by Article 1, Paragraph 5, and Article 1, Paragraph 18 of the New Jersey Constitution, and Section 1, of the Fourteenth Amendment of the United States Constitution; also that the provisions of the ordinance are obscure, vague and indefinite in that they are improper of reasonable interpretation, and, therefore, in violation of Article 1, Section 1, of the New Jersey Constitution, and Section 1 of the Fourteenth Amendment of the United States Constitution. In defense of the ordinance it is maintained that the municipality had full and ample authority to enact the challenged legislation in its lawful exercise of its inherent Police Power; and further, that the provisions of the ordinance are not obscure, vague and indefinite and that, therefore, the ordinance in question is constitutional and the conviction of prosecutor-appellant thereunder was proper.

That portion of the ordinance under attack provides as follows:

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

That freedom of speech and the right freely to communicate one's information and opinions to others, and the right

freely to assemble, are guaranteed to the individual under the Constitutions of this State and of the United States, are principles so well established as to admit of no dispute. Likewise the authority of a municipality to employ its inherent police powers to the end that good government, order and the protection of persons and property and for the preservation of public health, safety and welfare of its inhabitants, in exercise of such powers is a principle that is not open to challenge. It is thus apparent that individual privileges under the constitutional guarantees and police powers of the municipality for the protection of the public welfare, are relative rights, not to be arbitrarily asserted nor unqualifiedly insisted upon. Both must be so construed so as to effect a nicety of balance to the end that the rights of the individual and those of the public at large may be brought into harmonious rapprochement. The right or privilege of free speech or publication is guaranteed by the Constitutions of the United States and of the several states, has its limitations. The right is not an absolute one and although limitations upon such rights may not be made except in exceptional cases, the constitutional prohibition against freedom of speech was not intended to give immunity for every use or abuse of language. Near *v.* Minnesota, 283 U. S. 697, 75 L. Ed. 1357, 51 S. Ct. 625; Gitlow *v.* New York, 268 U. S. 652, 69 L. Ed. 1138, 45 S. Ct. 625. The right of freedom of speech is guaranteed by the provision of our constitutions both state and federal, and it has ever been the effort of the government of the courts to uphold and maintain it under proper and reasonable restriction. State *v.* Klapprott et al., 127 N.J.L. 395, 22 A. 2d 877. The foregoing authorities are representative of a host of decisions affirming those unalienable rights constitutionally guaranteed to the individual. On the other hand, it has been held time and time again, by authorities of equal weight and importance, that municipalities may enact regulations in the interest of the public safety, health, welfare and convenience so long as these regulations do not abridge the individual liberties secured by the State and Federal Constitutions. Schneider *v.* State of New Jersey, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146. Hague *v.* Congress of In-

dustrial Organizations, 307 U. S. 496. Cantwell *v.* Connecticut, 310 U. S. 296.

The right of a municipality to enact ordinances in furtherance of its inherent police powers finds statutory expression in the provisions of R.S. 40:48-2, which provides as follows:

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this State or of the United States, if it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." Specifically, under the general heading of ordinances, the governing body of every municipality may make, amend, repeal and enforce ordinances to:

"Auctions and noises. 8. Regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises," R.S. 40:48-1.

Addressing our attention to the language of the challenged ordinance, it is clear that its effect is to outlaw and prohibit in toto any use of any device known as a sound truck, loud speaker or sound amplifier, * * * on or upon the public streets, alleys or thoroughfares in the City of Trenton, * * *. It prohibits such use "for advertising purposes, or for any other purposes whatsoever, * * *". The decision below was grounded on the reasoning that the purpose of the legislation in question was to proscribe by the ordinance a potential nuisance. (See Kovacs *v.* Cooper, Judge, 135 N.J.L. 64, 50 A. 2d 451). That holding we conclude was erroneous. It is difficult to conceive, and we do not perceive in what manner and by what means the use of a sound truck or an amplifying device thereon, when properly regulated and confined as to the time, area and extent of its use, is, per se, a nuisance. Conceivably an unlimited and unrestricted use of such device might result in the creation of

a nuisance, but when reasonably limited and restricted might well be considered as a proper and permissible mode and means of conveying information and opinions beneficial to the public at large. It appears to us, and we so hold, that the primary aim of Section 4 of the Ordinance, under review, is to prohibit "loud and raucous noises," at all times and in all places in the City of Trenton, emanating from sound trucks, loud speakers, sound amplifiers, radios or phonographs, equipped with loud speakers or sound amplifiers, or other similar instruments. It is thus clear that Section 4 of the Ordinance is not regulatory within a proper exercise of the police power of the municipality. As stated in Hague *v.* Congress of Industrial Organizations, supra, "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be restricted in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied." Section 4 of the challenged Ordinance seeks to impose precisely the type of municipal regulation condemned in Hague *v.* Congress of Industrial Organizations. Section 4 is thus constitutionally repugnant. As such, it cannot stand.

So far as we are able to ascertain, the precise question before us has not been judicially determined in this State. The case of Atlantic City *v.* France, 75 N.J.L. 910, 70 A. 163 (upholding an ordinance prohibiting the emission of dense smoke from smoke stacks); Schwarz Bros. *v.* Board of Health of Jersey City, 84 N.J.L. 735, 87 A. 463 (relating to the removal of dead animals from public streets); Welsh *v.* Morristown, 98 N.J.L. 630, 121 A. 697 (regulating parking); Falco *v.* Atlantic City, 99 N.J.L. 19, 122 A. 610 (barber shop); Wagman *v.* Trenton, 102 N.J.L. 492, 134 A. 115 (public auctions); Spiro Drug Service, Inc., *v.* Board of Com'rs of Town of West New York, 133 N.J.L. 220, 43 A. 2d 889 (barber shop); advanced by defendant-respondent in support of the challenged Ordinance, all involved the public exercise of the police power of the municipality by means of reasonable regulation and restriction. The foregoing cases

are illustrations of a valid exercise of the police power. They are not authority for the unlimited, unrestricted and prohibitory use of the police power as set forth in Section 4 of the Ordinance under review.

We conclude that Section 4 of the Ordinance under attack represents an attempt by the municipality under the guise of regulation, to prohibit and outlaw, under all circumstances and conditions the use of sound amplifying systems. It follows that this portion of the ordinance is in collision and at variance with the principles relating to and governing a valid exercise of municipal police powers. As such, it cannot be sustained. It is then the duty and province of the Court to declare it invalid. N. J. Good Humor, Inc., *v.* Board of Com'rs of Borough of Bradley Beach, 124 N.J.L. 162, 11 A. 2d 113, Opinion by Mr. Justice Heher; First Church of Christ, Scientist, Newark, New Jersey, *v.* Board of Adjustment of City of Newark, 128 N.J.L. 376, 26 A. 2d 246, Opinion by Chancellor Campbell; O'Mealia Outdoor Advertising Co. *v.* Mayor and Council of the Borough of Rutherford, 128 N.J.L. 587, 27 A. 2d 863, Opinion by Mr. Justice Donges; Phillips *v.* Borough of East Paterson, 134 N.J.L. 161, 46 A. 2d 667, Opinion by Mr. Justice Bodine. Meyer *v.* Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 A.L.R. 1446; Jones *v.* Portland, 245 U. S. 217, 62 L. Ed. 252, 38 S. Ct. 112, L.R.A. 1918C, 765, Ann. Cds. 1918E, 660; Dobbins *v.* Los Angeles, 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18; Mugler *v.* Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273.

The judgment below is reversed.

Justice Heher and Judges Wells and Freund concur in the foregoing opinion.

APPENDIX "C"

NEW JERSEY COURT OF ERRORS AND APPEALS, FEBRUARY TERM, 1947

No. 27

CHARLES KOVACS, *Prosecutor-Appellant,*

vs.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton, *Defendant-Respondent*

MEMORANDUM OF COLIE, J.

I am of the opinion that the judgment under review should be reversed but I do not agree that Section 4 of the Ordinance is an unconstitutional exercise of the police power. The privilege of a citizen to use the streets for the communication of ideas is not absolute but must be exercised in subordination to the general comfort and convenience. Most assuredly the prohibition against making "loud and raucous" noises is a reasonable regulation.

Appellant was found guilty of a violation of Section 4 of "An Ordinance to Prohibit the Making of Unnecessary Noise." Section 4 reads:

> "That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

The prohibition is against the emitting of "loud and raucous" noises and applies equally to each of the enumer-

ated categories, i. e. sound truck, loud speaker, sound amplifier, radio or phonograph with the loud speaker or sound amplifier, calliope or any other instrument.

The only evidence before the trial court was that a patrolman heard a sound truck broadcasting music and heard a man's voice broadcasting from the sound truck. There is not a scintilla of evidence that the music or voice was loud and raucous, and under the wording of Section 4 such proof is an essential prerequisite to a finding of guilt of a violation.

APPENDIX "D"

NEW JERSEY SUPREME COURT, OCT. TERM, 1946

No. 258

CHARLES KOVACS, *Prosecutor,*

v.

ALBERT COOPER, JR., Judge of the First District Police Court of Trenton, *Respondent*

Submitted October 1, 1946; Decided on Certiorari

For the prosecutor, George Pellettieri.
For the respondent, Louis Josephson and John A. Brieger.

Before Justices Bodine, Perskie and Wachenfeld

The opinion of the court was delivered by

WACHENFELD, *J.:*

This writ of certiorari brings up for review prosecutor's conviction by the Police Court of the City of Trenton upon a complaint charging him with violating the fourth section of an ordinance of the City of Trenton entitled "An Ordinance to Prevent the Making of Unnecessary Noise."

The facts are undisputed that on August 22, 1946 prosecutor set an amplifier on a truck and while driven by another on South Stockton Street in the City of Trenton, first played music and then spoke through the sound amplifier. There

is no testimony in the record to indicate the purpose or the subject of this speech, although prosecutor's brief states he was using the sound apparatus to comment on a labor dispute then in progress in Trenton. He was tried and convicted in the Trenton Police Court on the following day upon a complaint charging a violation of Section 4 of the aforesaid ordinance and fined $50. in accordance with Section 6 thereof.

Section 4 of the ordinance reads as follows:

"That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

Section 6 of the said ordinance, dealing with the penalty provisions, reads as follows:

"That any person, firm or corporation who shall violate any of the provisions of this ordinance shall, upon conviction thereof, be punished by a fine of not to exceed two hundred ($200) dollars, or by imprisonment in the County Jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated, shall be deemed and taken to be a separate and distinct offense."

The sole question presented to this court by the prosecutor is the constitutionality of the ordinance. Two grounds on which it is attacked are, first, that it deprives the prosecutor of his rights to freedom of speech and freedom to communicate information and opinions to others and freedom of assembly in violation of Article 1, Paragraph 5, and Article 1, Paragraph 18, of the New Jersey

Constitution and Section 1 of the Fourteenth Amendment of the United States Constitution; second, that the provisions of the ordinance are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and, therefore, unconstitutional as violative of Article 1, Section 1, of the Constitution of New Jersey and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The relevant provisions of the ordinance apply only to (1) vehicles (2) containing an instrument in the nature of a sound amplifier or any other instrument emitting loud and raucous noises and (3) such vehicle operated or standing upon the public streets, alleys or thoroughfares of the city. The problem raised is novel in this jurisdiction. The court in *Evening Times Printing and Publishing Company v. American Newspaper Guild, et al.*, 124 N. J. Eq. 71, raised but passed over the question of the legality per se of the use of sound trucks with broadcasting amplifiers. In that case, it should be noted, there was no municipal ordinance involved and the complainant only sought to enjoin misrepresentations and not all broadcasting through the amplifier.

The purpose of the legislation is clear. The conduct proscribed by this ordinance constitutes a potential nuisance. The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is almost involuntarily attracted to the source of the noise. Thus new traffic hazards are added to the ever-increasing dangers of city thoroughfares. Hence, the purpose of the ordinance is founded in reason.

The freedoms of expression and assembly of the prosecutor may have been prohibited in this respect, but the ordinance leaves untouched the right of the prosecutor to express his views orally without the aid of an amplifier.

While the freedoms of speech and assembly are enunciated and preserved by the New Jersey and United States Constitutions, these freedoms are not absolute but may be curtailed under a reasonable exercise of the police power where the public health, safety and general welfare of the municipality demand.

In *Cox v. New Hampshire*, 312 U. S. 569, 61 Sup. Ct. 762, the United States Supreme Court considered the constitu-

tionality of a state statute prohibiting a "parade or procession" upon a public street without a special license. In upholding the validity of the statute the court pointed out the position of civil liberties in organized society and said:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

In Hague *v.* Congress of Industrial Organizations, 307 U. S. 496, 59 Sup. Ct. 954, while declaring unconstitutional an ordinance of the City of Jersey City which sought to license through the director of public safety meetings in the streets, parks and public places, the Supreme Court pointed out the same principal of ordered liberty in the following words:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the

public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied."

The freedoms of speech and assembly to which the prosecutor is entitled are not restricted except to benefit the general welfare and in such a manner that the "opportunities for the communication of thought and the discussion of public questions" are not substantially curtailed. Such regulation cannot be deemed a violation of the constitutional guaranties to which the prosecutor is generally entitled.

The freedom to express one's opinions and to invite others to assemble to hear those opinions does not contain the right to compel others to listen. The means of expression through a sound amplifier is tantamount to compulsion. The booming voice of a speaker in crowded thoroughfares of the city forcibly attracts the attention of almost all within a wide area. That alleged right was never intended to be guaranteed by either Constitution.

While there are no decisions in this jurisdiction concerning anti-noise ordinances, there are others which indicate a municipality may exercise its police power for the benefit of the public health, safety and general welfare even though such exercise might result in the regulation of constitutional liberties and deprivation of certain rights. In *Atlantic City* v. *France*, 75 N. J. L. 910, this court held valid an ordinance prohibiting the emission from smoke stacks of dense smoke containing soot in sufficient quantities to fall upon the surface of the city. Similarly, in *Schwarz Bros. Co.* v. *Board of Health*, 84 N. J. L. 735, an ordinance relating to the removal of dead animals from the public streets of Jersey City was held constitutional. An ordinance regulat-

ing parking was upheld in *Welsh* v. *Morristown*, 98 N. J. L. 630. This State has unhesitatingly permitted the regulation of various types of business enterprises where required by the public welfare. *Falco* v. *Atlantic City*, 99 N. J. L. 19 (barber shop); *Wagman* v. *Trenton*, 102 N. J. L. 492 (public auctions); *Spiro Drug Service* v. *Union City*, 130 N. J. L. 1, aff'd 130 N. J. L. 496 (drug store); *Starkey* v. *Atlantic City*, 132 N. J. L. 27 (drug store); *Amodio* v. *West New York*, 133 N. J. L. 220 (barber shop).

Other jurisdictions have approved anti-noise ordinances. *Brachey* v. *Maupin*, 277 Ky. 467, 126 S. W. (2d) 881; *Maupin* v. *Louisville, et al.*, 284 Ky. 195, 144 S. W. (2d) 237; *Hamilton* v. *Montrose*, 109 Colo. 228; 124 P. (2d) 757.

There is no merit to the contention that the ordinance is so obscure, vague and indefinite as to violate Section 1, Article 1, of the New Jersey Constitution and the Fourteenth Amendment of the Federal Constitution.

Only Section 4 of the ordinance, upon which the prosecutor was convicted, is relevant. In simple, unambiguous language it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint. The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden.

Its provisions are not unreasonable or oppressive but, on the contrary, are logical and advisable and its enforcement will give to the public at least a modicum of peace and quiet to which it is entitled.

Judgment affirmed with costs.

Mr. Justice Perskie dissents.

Filed December 30, 1946.